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No. 86-1944

In the Supreme Court of the United States

OCTOBER TERM, 1987

SOUNG O. KWOUN, ET AL., PETITIONERS

v.

SOUTHEAST MISSOURI PROFESSIONAL STANDARDS REVIEW ORGANIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

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The purpose of this memorandum is to advise the Court of the enactment on December 22, 1987, after we filed our brief for the federal respondents in opposition, of Section 4095 of the Omnibus Budget Reconciliation Act of 1987 (OBRA), Pub. L. No. 100-203.[1] Although this provision does not affect this case, in our view it significantly diminishes the prospective importance of the question presented in the petition.

Section 4095(a) of the 1987 OBRA amended Section 1156(b) of the Social Security Act, 42 U.S.C. 1320c-5(b), by providing that physicians located in certain areas[2] who

[1] The complete text of Section 4095 is appended. Also appended is the pertinent excerpt from the House Committee Report on the legislation.

[2] This new procedure applies only to providers or practitioners located in certain rural areas or areas with a health manpower shortage. However, HHS has advised us that approximately 75% of all

are excluded from Medicare eligibility are entitled to a hearing before an administrative law judge before the exclusion may take effect. Section 4095(a) goes on to provide that "[i]f the judge does not determine, by a preponderance of the evidence, that the provider or practitioner will pose a serious risk to [Medicare eligible] individuals if permitted to continue furnishing [Medicare-covered] services, the Secretary shall not effect the exclusion * * * until the provider or practitioner has been provided reasonable notice and opportunity for an administrative hearing thereon * * *." In addition, OBRA Section 4095(e) directs the Secretary to report to Congress within one year from its enactment (*i.e.*, by December 22, 1988) about the new peer review procedures recently adopted by HCFA and described in our brief in opposition (at 14-15). The report must (§ 4095(e)):

> set forth such improved procedures, describe the response of physicians and providers to the procedures, assess whether the procedures effect an appropriate balance between procedural fairness and the need for ensuring quality medical care, comment on the alternative provider-patient notification procedure contained in the agreement, and recommend whether such procedures should apply to institutional providers of health care services.

We explained in our brief in opposition (at 14-16) that this case is an inappropriate vehicle to review the question presented in the petition because the exclusion procedures challenged here have been modified by statutory and

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exclusions under 42 U.S.C. 1320c-5 have involved providers in areas that would qualify under the new procedure. To date, 61 exclusions have taken place under 42 U.S.C. 1320c-5, of which 45 (or 73.8%) involved practitioners in rural areas or in areas of health manpower shortage as defined in the new legislation.

administrative developments in the Medicare program occurring after the events of this case. The 1987 OBRA provides an additional reason for awaiting a case involving the new procedures before deciding what Medicare exclusion procedures are necessary in order to safeguard participants from civil damages liability. In cases as to which OBRA Section 4095(a) applies, the justification for affording absolute immunity to participants in the administrative process is overwhelming. In those cases a physician cannot be excluded from the Medicare program until after he has had an opportunity for a quasi-judicial hearing, which clearly provides the type of safeguards the Court has found justify absolute immunity for actions taken within the scope of an official's duties, as we explained in our earlier brief in opposition (at 15). Moreover, in a case arising under the new procedures, the Court will have the benefit of the administrative and congressional review of the new procedures that Section 4095(e) of the 1987 OBRA has set in motion.

For these additional reasons, the question presented in the petition does not warrant review by this Court.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1988

APPENDIX A

Section 4095 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 (Dec. 22, 1987), provides as follows:

> (a) IN GENERAL.—Section 1156(b) of the Social Security Act (42 U.S.C. 1320c-5(b)) is amended by adding at the end the following new paragraph:
>
> (5) Before the Secretary may effect an exclusion under paragraph (2) in the case of a provider or practitioner located in a rural health manpower shortage area (HMSA) or in a county with a population of less than 70,000, the provider or practitioner adversely affected by the determination is entitled to a hearing before an administrative law judge (described in section 205(b)) respecting whether the provider or practitioner should be able to continue furnishing services to individuals entitled to benefits under this Act, pending completion of the administrative review procedure under paragraph (4). If the judge does not determine, by a preponderance of the evidence, that the provider or practitioner will pose a serious risk to such individuals if permitted to continue furnishing such services, the Secretary shall not effect the exclusion under paragraph (2) until the provider or practitioner has been provided reasonable notice and opportunity for an administrative hearing thereon under paragraph (4).
>
> (b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to determinations made by the Secretary of Health and Human Services under section 1156(b) of the Social Security Act on or after the date of the enactment of this Act.

(c) **TRANSITION FOR CURRENT CASES.**—In the case of a practitioner or person—

(1) for whom a notice of determination under section 1156(b) of the Social Security Act has been provided within 365 days before the date of the enactment of this Act,

(2) who has not exhausted the administrative remedies available under section 1156(b)(4) of such Act for review of the determination, and

(3) who requests, within 90 days after the date of the enactment of this Act, a hearing established under this subsection, the Secretary of Health and Human Services shall provide for a hearing described in section 1156(b)(5) of the Social Security Act (as amended by subsection (a) of this section).

(d) **REDETERMINATIONS IN CERTAIN CASES.**—If, in hearing under subsection (c), the judge does not determine, by a preponderance of the evidence, that the provider or practitioner will pose a serious risk to individuals entitled to benefits under title XVIII of the Social Security Act if permitted to continue or resume furnishing such services, the Secretary shall not effect the exclusion (or shall suspend the exclusion, if previously effected) under paragraph (2) of section 1156(b) of such Act until the provider or practitioner has been provided an administrative hearing thereon under paragraph (4) of such section, notwithstanding any failure by the provider or practitioner to request the hearing on a timely basis.

(e) **REPORT ON IMPROVEMENTS IN PROCEDURES FOR IMPOSING SANCTIONS.**—Not later than one year after the date of enactment of this Act, the Secretary of Health and Human Services shall report to Congress on the improved procedures for imposing sanctions

against a practitioner or person under section 1156 of the Social Security Act established through agreement by the Health Care Financing Administration, the American Association of Retired Persons, the American Medical Association, and the Office of the Inspector General in the Department of Health and Human Services. The report shall set forth such improved procedures, describe the response of physicians and providers to the procedures, assess whether the procedures effect an appropriate balance between procedural fairness and the need for ensuring quality medical care, comment on the alternative provider-patient notification procedure contained in the agreement, and recommend whether such procedures should apply to institutional providers of health care services.

APPENDIX B

Excerpt from the Staff of the House Subcomm. on Health and the Environment of the Comm. on Energy and Commerce, 100th Cong., 1st Sess., *CP 100-P, Medicare and Medicaid Health Budget Reconciliation Amendments of 1987* 52-53 (Comm. Print 1987):

> Under current law, a physician or provider who is excluded from Medicare, on the basis of a finding by a PRO that the the [*sic*] physician or provider failed to furnish medical care of acceptable quality, is entitled to administrative and judicial review. This review takes place after the exclusion takes effect. Although this procedure has been upheld by Federal courts against challenges that it violates the Constitution, concerns have still been expressed that it is unfair for the exclusion to take effect prior to an evidentiary hearing. Arguments have also been made that such a procedure is not necessary to assure quality of care. Conversely, concerns have been expressed that providing administrative and judicial review prior to exclusion will result in long delays, during which Medicare patients will be subjected to the risk of receiving substandard care.
>
> The Committee bill would attempt to balance these concerns by providing that, before an exclusion took effect, the provider would be entitled to a decision by an administrative law judge (ALJ) as to whether patients would be at serious risk if the provider were to continue furnishing services during the review process. This is not intended to be a full hearing on the merits of whether the provider should be excluded. Instead, it should focus only on the immediate question of whether the provider's continued participation will pose a serious risk to patients. It is the Commit-

tee's intent that the scheduling and conduct of the hearing be expedited as much as possible, consistent with giving the provider adequate notice and opportunity to prepare for the hearing.

The exclusion would take effect immediately only if the ALJ concluded, on the basis of a preponderance of the evidence, that the provider's continued participation posed a serious risk to patients. If the judge did not make that determination, the exclusion would not take effect until after an administrative hearing on the merits of the exclusion. If the ALJ determined that the provider should be excluded, the exclusion would take effect at that point, even though the provider had an additional right to judicial review. Since the courts have upheld the current procedure as satisfying Constitutional requirements, the Committee believes it is permissible to exclude the provider after an administrative review but prior to judicial review.

The provision would be effective with respect to exclusion determinations made by the Secretary on or after enactment. In addition, it would be applied retroactively to those physicians and providers who received a notice of exclusion within one year prior to enactment, who have not exhausted the administrative remedies available to them under current law, and who request the hearing established under this provision within 90 days of enactment. For this purpose, the failure of a provider to have requested a hearing under current law on a timely basis would not be treated as having exhausted his appeal rights and would not preclude him from receiving this new hearing. If a provider were presently excluded, and the ALJ did not determine that the provider posed a risk to patients during his appeal process, the exclusion

would be suspended pending completion of the administrative hearing on whether he should be excluded.

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